# Order

**Michigan Supreme Court**
**Lansing, Michigan**

June 30, 2023

164110



PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 164110
COA: 353209
Genesee CC: 19-045059-FH

JOSEPH LEE JONES,
Defendant-Appellant.

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On May 10, 2023, the Court heard oral argument on the application for leave to appeal the January 13, 2022 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

CAVANAGH, J. (*concurring*).

This case raises important questions regarding when a criminal defendant is bound to a guilty or no-contest plea induced by a preliminary sentencing evaluation from a judge (often referred to as a "*Cobbs* evaluation" or a "preliminary evaluation"). *People v Cobbs*, 443 Mich 276 (1993). As in the criminal justice system across the United States, the vast majority of Michigan's felony cases are resolved by a guilty or no-contest plea,[1] and many of these pleas are induced by a sentencing agreement from the prosecutor or a preliminary

[1] See *Lafler v Cooper*, 566 US 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). In Michigan, between 2006 and 2022 approximately 78% of circuit court felony cases were resolved by plea. See Michigan Judicial Institute, *Interactive Court Data Dashboard* <https://www.courts.michigan.gov/publications/statistics-and-reports/interactive-court-data-dashboard/> (click "Outgoing Caseload") (accessed June 21, 2023). While this percentage has slowly trended downward the last few years, as of 2022 the percentage still exceeded 72%. *Id.*

evaluation from the judge.[2] "A no-contest plea or a guilty plea constitutes a waiver of several constitutional rights . . . . For a plea to constitute an effective waiver of these rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing." *People v Cole*, 491 Mich 325, 332-333 (2012).[3] Given the prevalence of plea-bargaining and the practical significance of guilty pleas for defendants, victims, and the functioning of Michigan's criminal justice system, appropriate guardrails are critical to ensure fairness and transparency. Nonetheless, I concur in denying leave to appeal in this case because, assuming there was error, defendant is not entitled to the relief he seeks from this Court (resentencing consistent with the preliminary evaluation).

I write separately to emphasize that trial judges who provide a preliminary evaluation should *clearly* advise the defendant of what sentence or range of sentences that judge believes might be appropriate. Specifically, trial judges who provide a preliminary evaluation based on a defendant's correctly scored sentencing guidelines (1) should clearly communicate that any sentencing guidelines discussed at the plea hearing are a preliminary estimate and the final guidelines determined by the court at sentencing might differ, and (2) should avoid vague terms like the "low(er)/upper end" of the sentencing guidelines and instead provide a numerically quantifiable sentence term or range, such as the "lower/upper

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[2] See generally *People v Killebrew*, 416 Mich 189, 197 (1982) (discussing the prevalence of plea bargaining). This Court formally approved "sentence bargaining" between a prosecutor and defendant in 1982, *id*. at 207-210, and approved a limited form of judicial participation in sentencing discussions in 1993, *Cobbs*, 443 Mich at 282-283. I am unaware of any data quantifying how frequently Michigan judges provide *Cobbs* evaluations. However, in a public comment submitted in response to proposed amendments to the court rules, the Michigan Judges Association (MJA) called *Cobbs* evaluations "a very important tool for the efficient and effective administration of justice" and suggested that many judges "currently resolve a high percentage of their cases with *Cobbs* evaluations[.]" MJA, *Letter in Response to the Proposed Amendments of MCR 6.302 and MCR 6.310* (File No. 2021-5) (February 25, 2022), available at <https://www.courts.michigan.gov/492be8/contentassets/a9d4a34cedc046bc843d4bbac37ab6f4/approved/2021-05_2022-02-25_commentfrommja.pdf> (accessed June 21, 2023) [https://perma.cc/4GAT-QT2L]. The prosecutor in this case echoed those thoughts at oral argument, stating that *Cobbs* evaluations are used "quite often" in Genesee County, that they are "a useful tool for all parties," and that they help mitigate the backlog of pending criminal cases.

[3] For much of this statement I refer only to guilty pleas for ease of reference. However, the principles addressed here apply equally to both guilty and no-contest pleas. *Cole*, 491 Mich at 332 n 6 (noting that "[n]o-contest pleas are essentially admissions of all the elements of the charged offense and are treated the same as guilty pleas for purposes of" due-process requirements).

half" or "lower/upper quarter" of the sentencing guidelines. At a minimum, these are best practices to ensure that a defendant knowingly and voluntarily enters a plea. The failure to follow these practices should put trial and appellate courts on alert that a defendant may be entitled to plea withdrawal.

## I. THE IMPORTANCE OF CLARITY IN *COBBS* EVALUATIONS

The *Cobbs* procedure is familiar to Michigan judges and criminal law practitioners. Under *Cobbs*, "a judge may state on the record [before accepting a guilty plea] the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *Cobbs*, 443 Mich at 283 (emphasis omitted).[4] This preliminary evaluation can either be a "sentence to a specified term or within a specified range . . . ." MCR 6.310(B)(2)(b). A judge is not required to impose a sentence that is consistent with the preliminary evaluation. *Cobbs*, 443 Mich at 283. "However, a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation." *Id*.; see also MCR 6.310(B)(2)(b).

Although not explicitly stated in *Cobbs*, a defendant's right to plea withdrawal is clearly premised on principles of due process, which require that a decision to plead guilty be voluntary and knowing. Cf. *People v Killebrew*, 416 Mich 189, 207-210 (1982) (holding that a guilty plea induced by a prosecutorial sentencing agreement or recommendation that the trial court declines to follow is not knowing or voluntary and therefore the defendant has a right to plea withdrawal).[5] As this Court explained in the related context of prosecutorial sentencing recommendations:

> Although the prosecutorial "recommendation" would seem to inform the defendant of the consequences of his plea—that the prosecutor is merely suggesting a sentence and that the judge is not bound to follow the recommendation—the truth is that most defendants rely on the prosecutor's ability to secure the sentence when offering a guilty plea. This is true even

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[4] Importantly, a trial judge is never *required* to provide a preliminary evaluation. *Cobbs*, 443 Mich at 286 ("The procedure outlined in this opinion is one that Michigan courts and judges may decline to utilize.").

[5] See also *People v Brinkley*, 327 Mich App 94, 103 (2019) (recognizing that plea withdrawal was warranted based on an unclear *Cobbs* evaluation because the plea "was not understandingly, knowingly, voluntarily, and accurately made"); *People v Smith*, 319 Mich App 1, 5 (2017) (holding that plea withdrawal was required because failure to comply with the *Cobbs* evaluation violated defendant's right to due process).

> when the court specifically admonishes the defendant that it is not bound by the prosecutor's recommendation. All disclaimers that the court is not bound are often viewed as ceremonial incantations. . . .
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> . . . To most defendants, the distinction between a sentence agreement and a sentence recommendation is little more than a variation in nomenclature.
>
> A full understanding of the consequences of a plea is impossible where the defendant, believing that he has negotiated a specific length of sentence, tenders his guilty plea, only to find that he is bound by the act of self-conviction, but the trial judge is free to impose any sentence within the statutory range. [*Id*. at 208-209.]

The concern that a defendant will be misled into pleading guilty is even greater in the *Cobbs* context, where the presiding judge is representing the sentence or range of sentences they believe may be warranted. See *Cobbs*, 443 Mich at 281 ("The coercive potential of judicial involvement [in plea negotiations] is obvious, and stems from the overwhelmingly advantageous bargaining position of the judge."); *Killebrew*, 416 Mich at 202 (noting the "potential coercive effect" where a judge is involved in the plea-bargaining process because "the judge wields the decisive sentencing power to which the defendant must submit"). A defendant's absolute right to plea withdrawal is one safeguard that mitigates the danger that judicial involvement in sentencing negotiations might violate due process by coercing or misleading a defendant into pleading guilty.

The concerns underlying the right to plea withdrawal underscore the importance of clearly communicating the preliminary evaluation. In justifying this limited judicial participation in sentencing discussions, this Court explained:

> Coercion is avoided when a judge does not initiate a discussion of the sentence, and when a judge does not speculate on the sentencing consequences of future procedural contingencies. The judge's neutral and impartial role is enhanced when a judge provides *a clear statement of information* that is helpful to the parties.
>
> The question for the judge is simply, "Knowing what you know today, what do you think the sentence would be if the defendant pled guilty, as charged?" Justice is advanced and not hindered when fair questions are answered honestly. [*Cobbs*, 443 Mich at 284 (emphasis added).]

In other words, a judge's participation in sentencing discussions is only legitimate if their communications are honest and clear. A defendant cannot make a truly knowing or voluntary decision to plead guilty if the plea is induced by a preliminary evaluation they do not understand.

In keeping with these principles, a trial judge must clearly communicate what sentence or range of sentences they are considering. As this Court explained in the context of an improper promise of leniency that induced a plea:

> [T]he inquiry in these circumstances is not what an astute lawyer would take as the meaning of the words used. In this situation we do not require that the promise of leniency be established beyond any doubt whatever, or even beyond any reasonable doubt in the mind of one learned in the law and acquainted with judicial administration. The requirement is far less stringent: If the evidence establishes that the prosecutor or the judge has made a statement which fairly interpreted by the defendant (in our case of foreign extraction and with only an eighth-grade education, presumably in court for the first time) is a promise of leniency, and the assurance is unfulfilled, the plea may be withdrawn and the case proceed to trial. [*In re Valle*, 364 Mich 471, 477-478 (1961).]

I believe this framework applies equally in the *Cobbs* context such that a defendant is entitled to plea withdrawal if, *from that defendant's perspective*, the sentence imposed is inconsistent with a "fair[] interpret[ation]" of the preliminary evaluation. *Id*. This framework avoids due-process problems by ensuring that a defendant is not bound unless they are "fully aware of all the consequences of [their] guilty plea." *Killebrew*, 416 Mich at 210.

## II. PRACTICES TO AVOID IN COMMUNICATING A *COBBS* EVALUATION

Trial courts often provide a preliminary evaluation that is a range of sentences within the defendant's sentencing guidelines. See, e.g., *People v Price*, 477 Mich 1, 6 (2006) (addressing a preliminary evaluation for a sentence not to exceed the sentencing guidelines). This case exemplifies two potential pitfalls that trial judges in this situation should avoid to ensure they are clearly communicating their preliminary evaluation.

First, trial courts should clearly explain that the evaluation is not based on the sentencing guidelines as calculated by the parties at the plea stage and that any guidelines range discussed at that stage is not final. Trial courts usually provide a preliminary evaluation as to a defendant's minimum sentence, i.e., their parole eligibility date, as this is typically the only part of a defendant's sentence over which the court has discretion. See generally *People v Arnold*, 508 Mich 1, 14 n 25 (2021). Given that trial courts are required "to consult the applicable [sentencing] guidelines range and take it into account when imposing a [minimum] sentence," *People v Lockridge*, 498 Mich 358, 392 (2015), it is unsurprising that they often incorporate the correctly scored sentencing guidelines into their preliminary evaluations.

The possibility for confusion arises where a defendant is provided an estimated sentencing guidelines range before pleading guilty, but the final range determined by the court at sentencing is different. While the bench and the bar are generally aware that any guidelines range discussed at the plea stage is only an estimate that may change after additional information is discovered in preparation for sentencing,[6] a defendant will not necessarily know that. See *In re Valle*, 364 Mich at 477-478 (holding that the pertinent inquiry as to whether a defendant has a right to plea withdrawal is not how "one learned in the law and acquainted with judicial administration" would understand the terms of the plea, but rather how that defendant would "fairly interpret[]" the terms).[7] Thus, a sentencing judge should clearly communicate to the defendant that any sentencing guidelines range discussed at the plea stage is preliminary and subject to change. In addition, the court should advise the defendant whether or not the defendant will be permitted to withdraw their plea if the sentencing guidelines completed at the time of the court's preliminary sentencing evaluation are lower than the actual guidelines range determined by the court at sentencing.[8]

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[6] The guidelines range discussed during plea discussions is generally an estimate based on how the prosecutor and defense counsel believe that the sentencing variables will be scored. After a plea is entered, the probation department collects information about the offender and the offense to prepare the presentence investigation report (PSIR), which must include "the computation that determines the recommended minimum sentence range . . . ." MCL 771.14(2)(e)(*iii*). The parties may challenge the guidelines range provided in the PSIR, and the sentencing judge ultimately determines the defendant's applicable guidelines range before imposing sentence. See MCL 777.21(1)(a) and (b).

[7] Cf. *People v Likens*, unpublished per curiam opinion of the Court of Appeals, issued January 10, 2008 (Docket No. 274710), p 2 (permitting plea withdrawal, in part, because defense counsel indicated that if the final guidelines range was different from the preliminary range, "plea negotiations would return to the status quo ante").

[8] In 2021, this Court published for public comment proposed amendments to MCR 6.302 and MCR 6.310 that "would require a court to specify the estimated sentencing guideline range as part of a preliminary evaluation of the sentence and to clarify that a defendant may withdraw a plea when the actual guidelines range is different than initially estimated." Proposed Amendments of MCR 6.302 and MCR 6.310 (ADM File No. 2021-05), 508 Mich 1211, 1212 (2021) (staff comment). The Court has yet to take any formal action on this matter. Regardless of whether this Court adopts any amendments to the court rules relating to estimated guidelines ranges during *Cobbs* evaluations, at minimum a best practice for a court that *does* provide an estimated guidelines range is to clearly communicate that the preliminary evaluation is premised on whatever the final guidelines range is determined to be.

Second, trial courts should avoid using vague phrases that are "susceptible of various interpretations" when describing the range of sentences within the sentencing guidelines they are considering. *In re Valle*, 364 Mich at 477. For example, courts should avoid stating that they are considering a sentence at the "low(er) end" of the guidelines without providing more clarity on the precise sentence or range of sentences being considered.[9] Depending on context, such language could reasonably be understood to refer to a sentence (1) at the very bottom of the guidelines, (2) anywhere in the lower half of the guidelines, or (3) in some unspecified range between the bottom and middle of the guidelines. See *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2006 (Docket No. 258801), p 2 (holding that the phrase "low end of the guidelines" did not communicate a sentence *anywhere* in the lower half of the guidelines or require a sentence at the very bottom of the guidelines, but rather communicated a sentence "at or near the actual low end of the guidelines," which did not include a sentence "at the upper end of the lower half of the guidelines"); see also *id*. at 2 n 1. For similar reasons, courts should avoid stating that they are considering a sentence at the "upper end" of the guidelines or a sentence "near" some part of the guidelines.

The clearest way to avoid uncertainty is to use exact numbers, such as a sentence between 24 months and 36 months. However, as discussed above, trial courts often understandably base their preliminary evaluation on the properly scored guidelines range, which might differ from the guidelines determined after the plea is taken. In this situation, courts can clearly communicate the preliminary evaluation in various ways, including but not limited to (1) a sentence not to exceed the properly scored sentencing guidelines, (2) a sentence at the low end of the guidelines, defined as the lowest possible sentence within the guidelines range, or (3) a sentence within the lower or upper half (or some other fraction) of the properly scored sentencing guidelines.

## III. CONCLUSION

In this case, I have serious concerns about the lack of clarity in the trial court's preliminary evaluation. The trial court fell into both traps described above; that is, the court provided a preliminary guidelines range during the plea hearing without clearly explaining that the final one could be different, and it used vague language to describe the range of sentences it was considering. Moreover, it appears from the record that defendant

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[9] For appellate decisions addressing this or similar language, see *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2006 (Docket No. 258801); *People v Velez*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2015 (Docket No. 315209); *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2022 (Docket No. 353209).

sincerely believed that the trial court indicated it was considering a sentence at the very bottom of the preliminary guidelines range and that this was at least one reasonable interpretation of the preliminary evaluation. See *People v Brinkey*, 327 Mich App 94, 102 (2019) (holding that the defendant was entitled to plea withdrawal where his confusion regarding the terms of the *Cobbs* evaluation was "apparent from a review of the record").

I nonetheless agree with denying leave to appeal because the only remedy defendant seeks in this Court is resentencing consistent with the preliminary evaluation.[10] The most defendant would be entitled to is a remand to "give[] the sentencing court the discretion either to adhere to the *Cobbs* evaluation or allow the defendant to withdraw the plea." *People v Brown*, 492 Mich 684, 700 n 52 (2012); see also *People v Spencer*, 477 Mich 1086 (2007).[11] Accordingly, even assuming there was error, defendant is not entitled to the relief he is seeking. That said, I encourage trial courts to be as clear as possible in their *Cobbs* preliminary sentencing evaluations to ensure that guilty pleas are knowingly and voluntarily entered.

VIVIANO and BOLDEN, JJ., join the statement of CAVANAGH, J.

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[10] While defendant's appellate counsel at oral argument asked for plea withdrawal as a "secondary remedy," he made clear that he was primarily asking for resentencing consistent with the preliminary evaluation, and this is the only remedy requested in defendant's supplemental brief. But under *Cobbs*, a trial court cannot be *required* to impose a sentence consistent with the preliminary evaluation. See *People v Williams*, 464 Mich 174, 177 (2001) ("We made clear [in *Cobbs*] that this preliminary sentencing evaluation does not bind the judge's sentencing discretion."). Defendant does not provide any argument (let alone a persuasive one) for a modification of the law in this manner.

[11] Given the debate in this case over the sentence(s) communicated in the preliminary evaluation, whether resentencing would be an appropriate remedy is unclear. In any event, the trial court's sentencing discretion could not be limited on remand.